1. Socio-scientific basic information
The M.A. Childhood Studies and Children’s Rights is mainly based on theories of childhood, on education and work with children, disadvantaged and discriminated children, on experiences of social and domestic violence and on practice, oriented to children’s rights.

Without this information and a general overview of the main publications about the conditions of growing up it is impossible to improve the circumstances of children and youth. It is a basic condition to understand their life, to know their needs and this is necessary to find starting points for political strategies and actions.

Therefore, it is for good reason that knowledge and applied research of the social sciences are an essential part of childhood studies.

2. The relationship of social sciences and law
These underlying social facts are the ‘raw material’ of law and justice. Acts, articles and paragraphs always refer to the social reality. It is the classical purpose of law, to regulate human behavior and social processes. This is the reason why legal provisions never exist without a relation to human settings.

But at the same time social reality never exists without normative aspects. There are no circumstances, which do not include the question, how to estimate what someone is doing in social affairs. Every action in human life refers to external regulations or internally to the human conscience; social behavior is always related to the question, whether it is judicially and/or ethically correct.

However, in social sciences this aspect is generally insufficiently taken into consideration. It seems that law is an additional point of view – normally reserved to jurisprudence, lawyers and judges. In studies it is mostly a special sector of applicable provisions and paragraphs - compared to childhood studies a minor field not really linked with social sciences.

This separation is evidently unfounded and at the same time remote from everyday life. Therefore in the scientific discourse a fundamental debate about the relationship of social sciences and law is required.
3. “Insolvable structural conjunction”

The tension between norms and life in German philosophy is discussed by the differentiation of BEING and DUTY (“SEIN” und “SOLLEN”). DUTY contains the principles, what we shall do by ethics or law, as a whole called legal system (“Rechtsordnung”). In contrast, BEING means the reality of social life, the real life. In fact DUTY and BEING are understood as an explicit dualism. It seems that the social reality exists on its own on the bottom and the legal system just as well is on its own hovering above. Social life is concrete and in contrast law seems to be abstract.

It is very important to understand, that this separation effectively does not exist. For example Article 3 CRC says:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This provision makes a conjunction of a normative instruction with the real life of children. Only in regard to the real interests the content of this term becomes comprehensible. Only in this way does it become clear, what is to be implemented by all protagonists in children’s affairs. In general, it is impossible to understand a unique of normative instructions without reference to an imagination of real life. It is necessary to know, what these little beasts are, called children, or what means court of law or what are the best interests. Even the term consideration is incomprehensible, if you don’t know that its meaning is an internal, intellectual process of human behavior. All these perceptions have an effect on the content of instructions in order to understand what they intend. This is the reason for alteration of law, because the social reality and common opinions change. The established terms of the written law change their meaning according to these perceptions. Therefore it is an important task, to interpret the law in consideration to the real life.

Against this background, important representatives of the jurisprudential discourse in Germany have argued for an overcoming of the dualism of norms and social life. Notably Gustav Radbruch\(^1\) and Friedrich Müller\(^2\) have elaborated that the traditional dualism is not appropriate. Arthur Kaufmann\(^3\) has found an accurate formula, when he says: norms and life are linked by a “UNLÖSBARE STRUKTURVERSCHLINGUNG” – perhaps we can say:

\(^2\)Müller, Friedrich, Strukturierende Rechtslehre, Berlin 1984
“insolvable structural conjunction”. They are always linked and you are able to understand them only if they are reciprocally related.

As a proof, you can compare the general rule of interpretation in Art.31 of the Vienna Convention on treaty law. It says:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Juridical terms always refer to practical social life. The key point of this “insolvable structural conjunction” is that law links together modes of behavior and social aims with the entitlement of validity – maybe connected with moral imperatives or judicial instructions. This is the reason why we have to obey lawful requirements in contrast to philosophical statements. Whether the earth is a globe or a plate you can approve it or not. But: if something is linked with a moral or legal instruction it becomes binding - as a moral imperative in a sense of intrinsic or binding for everybody in an extrinsic sense. Notably if a statement is (democratically) regulated it is valid as a legal rule possibly attached to corresponding penalties. For an improvement of the social situation of children it is of utmost importance that the aims of development will be connected with the power of enforcement by statute law – even though in a moral sense the best interests of the child are binding, also if not stipulated as written law.

4. Implications for Studies on Childhood and Children’s Rights
The “insolvable structural conjunction” has fundamental consequences for Childhood Studies and Children’s Rights. It needs a balance between social studies and the development of a well-grounded understanding of law. Otherwise you understand neither social affairs nor the function of law in the social reality of children’s life. Justice without regard to the social circumstances becomes abstract and will be not in touch with life; social affairs without being bound to justice and ethical values become antisocial. Therefore issues of justice are not a secondary subject - in academic social studies it is necessary to acquire essential knowledge of law. This is why we have to answer the question: What means law?

4.1 ‘Written law’
Usually justice, law and rights are connoted with articles, paragraphs, conventions, treaties, regulations and administrative acts – rights which are codified. In summary this is the ‘written law’ or statutory law – in German so called ‘positives Recht’- we can say ‘positive law’, because it is expressively regulated as binding law.
Indeed this is the ‘bottom’ of law. Written law is indispensable for legal security and the enforcement of law. It is a decisive precondition for enforceable rights. Therefore it is important to codify judicial principles and legal entitlements.

At this point it is necessary to make a categorical differentiation: you have to distinguish between written law in an ‘objective’ or ‘subjective’ sense. Especially according to international treaty law we have on the one hand public commitments objectively binding for the contractual partners and on the other hand individually enforceable rights. In practice there is a decisive difference: Public obligations are to be executed by the competent authorities, but individual citizens have no rights to enforce them. A private right of action only exists if the individual subject is entitled to it by written law. For example: according to art. 24 para. 1 of the Convention on the Rights of Persons with Disabilities ”states shall ensure an inclusive education system”, an objective obligation to reform the education system – without the possibility to pursue it by private persons. In contrast para 2 assures that “persons with disabilities are not excluded from the general education system” – a subjective individually enforceable right to admission. In detail:

4.1.1 Public commitments based on international treaties objectively contain three key terms, which we should keep in mind:

- to respect, as an obligation, to all treaty provisions without exception,
- to protect as an obligation to provide a shelter for all children
- to fulfill as an obligation to execute the assumed treaty commitments.

In order to fulfill the international law - first of all – it has to be transformed into domestic law, normally binding under international law by ratification and in order to be valid intrastatly by agreement of the domestic legislator.

This obligation is expressed by art. 4 CRC:

"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

The transformation in the sense of ratification and the intrastate enforcement of these obligations is part of parliamentary and political proceedings, mainly prosecuted by the government, political parties and NGO’s.

In only one special case, these obligations are to apply without transformation, if it’s a question of self-executing treaty norms. These norms must allow a direct application by being feasible and have to be demanded by the treaty. For example, we can look again at art.3 CRC. Here the fair
balance between the best interests of the child and other needs is stipulated without any further limiting conditions. It is precise enough to be applied by all authorities and it is stipulated by the contracting parties in order to improve the rights of children effectively. In this case, the treaty is immediately applicable.

4.1.2 This is a general rule of operation: in order to create *enforceable rights* they have to be defined as an individual right by written law. Generally, it needs specific provisions by the domestic legislator. But in case of self-executing provisions by an international treaty the right to sue can follow if the treaty expresses that spirit and purpose of the treaty is stipulated to enhance the legal position of the individual as such. In fact, the CRC does not aim only for an abstract and objective proclamation of children’s rights, but is targeted at the chance of the child to pursue his or her rights in the concrete individual situation. As far as the CRC is self-executing as for example art. 3, the child himself can pursue his rights - respectively the parents or an ombudsman acting on behalf of the child.

4.2 Culture of law
The obligation to *protect* and to realize the rights of the children cannot be the task only of the public and official authorities. It is a task of the society as a whole. Many actors have to cooperate – finally the complete social reality should be oriented towards the realization of children’s rights and their well-being. Compare the mentioned “insolvable structural conjunction”: the realization of justice includes all actions concerning children in social life. Without the engagement of all members of the society it is impossible to realize a child-friendly community.

Reciprocally we will only have a child-friendly legislation, if awareness of children’s needs in everyday, social life exists within political parties and NGO’s, not less than by parents, kindergarten teachers, teachers, physicians and by everybody, who has something to do with children in daily life.

This is the reason why the concept of law is not sufficient unless it includes social life as the place of realization. Without social responsibility and this pursuit of the right in everyday life, written law remains a dead alphabetic character – a book only, but no social reality in human relations.

Therefore above the bottom of *written* law we can recognize in a manner of speaking a next ‘stratification’ of the law.\(^4\) *Gustav Radbruch* defines it as the ‘culture of law’— Rechtskultur. The culture of law on the one hand is affected

---

\(^4\) Henkel , Heinrich, Einführung in die Rechtsphilosophie – Grundlagen des Rechts, München-Berlin 1964, § 2 S. 8 ,Das Recht im „Schichten-Aufbau‘ dieser Welt‘
by the written law as by rules and standards, which are the ‘guardrails’ for
everybody – in case of need sanctioned by criminal law. On the other hand
the social life is orientated on values, which influence the culture of law from
above as well as the subjacent written law does from below.

4.3 Ethical principles of law
These values constitute the moral ‘superstructure’ of law. Written law
constitutes legality, ethical principles justify the legitimation of law.

The reason why ethical principles are valid demands a special philosophical
debate. As a conclusion, we can observe that values are valid by
themselves. Of course, fundamental rights are normally fixed by written law
– absolutely important in order to generate enforceable rights. However
human dignity, the right to life and physical integrity or the fundamental
right to freedom of expression do not have their true reasoning because they
are parts of the written law. In truth they are immediately connected to the
fact, that we are humans. In the German juridical discourse, this
‘stratification’ is called über-positives Recht – as to say: not ‘positive’ but
‘supra-positive law’.\(^5\)

This is expressed by the preamble of the International Covenants on Civil
and Political as well as Economic, Social and Cultural Rights\(^6\) by the
statement that human rights

"derive from the inherent dignity of the human person”.

After all: the source of basic rights is primarily not written law, but
fundamental judicial principles, which are derived from human dignity. Their
essential content cannot be created or abolished by voting procedures, it can
only be respected or denied.

However, their validity is not independent of social developments. Even if
the principal source of human rights are not the social circumstances as such
but the values themselves, these values change their content with regard to
social conditions, which are changing in the course of time. For example: In
the nineties in Germany, the interdiction of domestic violence did include
neither all kinds of violence against children nor domestic abuse. Meanwhile
the awareness for children as inviolable personalities has increased so that
the written law was reformed in 1998.

---

\(^5\) Compare note 1
International Covenant on Civil and Political Rights (ICCPR)
The ethical values are multifaceted. To be mentioned are equality, proportionality, self-determination and participation. Most of these principles are codified by written law especially by constitutions like the German Grundgesetz or the Charter of European Community or by human rights treaties like the CRC. In order to repeat we have to record, that human rights are enforceable only by written law, but their true source are the self-consistent ethical principles as ‘supra-positive’, unwritten law.

The importance of this distinction may not be underestimated. For, statute law is to apply exactly according to the stipulated rules and they are binding only for the concrete addressees. Constitutionally or contractual human rights in particular are binding for states exclusively as stipulated. But human rights as a moral supra-positive imperative are ethically binding for everybody. Therefore, in practice it is not right to reduce children’s rights to written law only. Especially in the context of political debates, it is important to argue not only with articles and paragraphs, but always at the same time with arguments oriented to social and juridical values. In this way, you can reach not only the immediate addressees of the written law, but initiate a large social and political discussion about the development of children’s rights. Certainly, you must not study the law like a lawyer, instead, you have to remember and to explore your own status as a human being in order to understand the human content of the law, especially children’s rights and their best interests. This can be the decisive impulse to create new law or to further develop the existing written law.

4.4 Justice
The characteristic of laws and ethical principles is, that they are valid equally for each human being. In this sense, the law is obliged to proceed equally. Consequently, written law is formulated as a general rule, because it has to be valid for the society as a whole.

But this may be wrong in particular cases, if it is a question of the human being as a unique individual. In real life there are unique conditions and unique individuals, where general rules are not appropriate. Concerning children, on the one hand you have to provide sufficient conditions for growing up by the right to education – that is valid equally for each child. On the other hand, it is obvious, that you cannot statute general rules for individual educational aims without injuring the right onto an individual development. Public authorities have to guarantee conditions, which ensure dignity, promote self-reliance and facilitate the child's active participation in the community (art. 23 CRC) for all children. But apparently these individual aims of development are not adjustable in the same manner for everyone because educational encouragement must be necessarily individual.
Therefore, diversity in education is a principle owing to the individuality of each child. Each child has to be treated as a self-contained personality. That means essentially to respect human dignity.

This is not unique in the legal system. The individual living conditions can demand an exception to the rule. In order to realize justice for instance the criminal law seeing individual circumstances allows an act of grace. After all we must recognize justice not as a ‘supra-general’ norm, but related to the singular human being and the individual human dignity. Finally, in this sense justice is the central idea of law. It is a permanent challenge to find out what is just in the concrete case.

This challenge does not exist only for public authorities, in particular for courts of law; it is a challenge in every face-to-face encounter in practical life and is to be considered by everybody. It is the solution how to practice justice in regard to problems which depend on individuality. Especially all questions of the path of life of the child cannot be answered by general principles but only in touch with the individual biography of the child.

Therefore, each child needs sufficient conditions for growing up as are stipulated in the CRC in force equally for all children. But the individual aims of development, the individual sense of dignity, the sense of self-worth and the sense of belonging to the community\(^7\), entitled as children’s rights, can only be really protected by justice in each particular case.

5. Stratifications of law

It is helpful to concentrate this overview of law by a diagram like a pyramid with the differentiation of several stratifications\(^8\):

---

\(^7\) Specified by the preamble and art. 24 of the Convention of the United Nations on the rights of persons with disabilities

On the one hand, *top down*, law is deduced coming from JUSTICE as a measure for all stratifications. It is concretized by ETHICAL PRINCIPLES and is practiced in the social reality as a CULTURE OF LAW and: if necessary fixed by WRITTEN LAW. One the other hand, *bottom up*, the written law as the binding base, is precondition for enforceable rights and – if just – it is a guarantee for legal security and a decisive condition for realizing justice. As a result these four stratifications are not isolated, but interdependent.

The qualities of these stratifications may be comprehensible in another way by looking at an old tradition of the Grecian philosophy. The ancient Greeks distinguished four elements – which can be understood as physical states: fiery, airy, liquid and fast. In order to feel the qualities of the stratifications you can remember these different statuses: Statutory law as the fast solid ground, social life as the flowing social reality, ethical principles of law like the ubiquitous air and justice as the impulse giving fire for all.

6. Teaching and learning Children’s Rights

Juridical sciences are concentrated to the divers fields of written law. Studies of childhood and children’s rights must have another focus.

6.1 As mentioned, the first focus should be a fundamental concept of law and a basic understanding of the juridical and social interrelations.

6.2 Concerning the written law, it is not necessary to study it in particular. Important to have is an overview that the written law is divided in

- Public international law, especially conventions and treaties under international law as for example the Conventions of the United Nations, but also the European Convention on Human Rights from 1950 and the Charter of the European Conjunction, especially art. 24 corresponding to art. 3 CRC.
  After ratification and consent by the domestic legislator or in case of self-executing these provisions regularly are a part of the domestic law and decisive for the interpretation of the territorial law – see above.
- And domestic law. It is structured in
  - upper-level constitutional law such as in Germany the Grundgesetz and
  - ordinary laws as private law, criminal law, administrative law or special laws as copyright or family law.

6.3 Necessary to know about the CRC are the general principles

- Art. 2: The right against all forms of discrimination
- Art. 3: The primary consideration of the best interests of the child

---

9Maywald, Jörg, Kinder haben Rechte, Weinheim-Basel 2012, P. 41
• Art. 4: The obligation to realize children’s rights
• Art. 5: Respect for the parental rights
• Art. 6: The right to life and the right to survival and development
• Art. 12: The right to participation

These principles express and clarify, that the child is a self-contained human subject, which is equivalent to the human dignity of the child – in the final analysis this is the spirit of the convention as a whole.

6.4 Furthermore, one should have an overview about the CRC in order to be able to do research in case of concrete needs, especially
• Art. 6: The inherent right to life and the right to survival and development of the child
• Art. 8: The right to preserve his or her identity
• Art. 9: The right not to be separated from his or her parents against their will
• Art. 12: The right to express their own views freely in all matters affecting the child
• Art. 13: The right to freedom of expression
• Art. 14: The right to freedom of thought, conscience and religion
• Art. 15: The rights of the child to freedom of association and to freedom of peaceful assembly
• Art. 19: The right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation
• Art. 22: The right, that a child who is seeking refugee status receives appropriate protection and humanitarian assistance in the enjoyment of applicable rights
• Art. 23: The right of a mentally or physically disabled child to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community
• Art. 24: The right to the enjoyment of the highest attainable standard of health
• Art. 26: The right for every child to benefit from social security and the child’s welfare
• Art. 27: The right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development
• Art. 28: The right of the child to education, with a view to achieving this right progressively and on the basis of equal opportunity
• Art. 31: The right of the child to rest and leisure
• Art. 32: The right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development
• Art. 36: The right to be protected against all other forms of exploitation prejudicial to any aspects of the child's welfare
• Art. 37: The right to be protected from all forms of sexual exploitation and sexual abuse.
• Art. 44: The governmental obligation to frequent reporting.

In order to enforce these rights the ordinary courts are competent, if the convention is ratified and agreed by the domestic legislator or in case of self-executing provisions. Additionally the Third Optional Protocol to the CRC on a Communications Procedure (OP3 CRC) needs consideration. It establishes an international complaints procedure to pursue child rights violations, allowing children to bring complaints about violations of their rights directly to the UN Committee on the Rights of the Child in Geneva, if they have not found a solution at national level.10

10 https://www.kinderrechtskonvention.info/individualbeschwerdeverfahren-378/
Furthermore, it is possible to take action to the European Court of Human Rights, a procedural path, which is based on the European Convention on Human Rights from 1950.

6.5 In the domestic constitutions many human rights are established, as in the German Grundgesetz by

- Art. 1: inviolability of human dignity
- Art. 2: free development of the individual
- Art. 3: equality before the law
- Art. 4: freedom of opinion
- Art. 6: parental rights

These basic rights are valid for children, too. But children’s rights are not yet stipulated explicitly. Actually, a new effort has been started to include them into the German constitution.

6.6 Normal laws are numerous and complex. They cannot be the content of ordinary studies of children’s rights. They are the task of jurisprudence. If necessary, one has to organize a competent consultation.

6.7 The only determination, which must be mastered exactly is art. 3 CRC. The juridical content of this instruction is widely unknown even though it could be in practice the most effective provision of the CRC. The UN-Committee on the Rights of the Child has composed a detailed General Comment, which must be worked through while studying children’s rights.\(^{11}\)

6.7.1 Art. 3 CRC is self-executing and directly enforceable.\(^{12}\) The child represented by his or her parents or his or her legal guardians has the right to sue. They can refer to art. 3 CRC in each particular case, in every planning processes and proceedings contra all protagonists who influence the circumstances of children - law courts as well as public authorities or parliamentary bodies.

6.7.2 Quintessence of art. 3 CRC is to balance the best interests of the child with other interests valid for a specific individual child as well as for groups of children or for children in general.

\(^{11}\)General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)
http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

\(^{12}\)Lorz, Ralph Alexander, What does Art. 3 Par. 1 of the United Nations Convention on the Rights of the Child mean for the domestic application of the law?
6.7.3 The best interests are defined principally by basic rights and human dignity. The best interests in terms of basic rights are specified by public international law, national constitutions or normal laws. Especially the CRC-rights to respect, to protect and to fulfill all legal specifications describe the content of the best interests.

Concerning decisions in question of the child and his or her path of life the guiding principle is art. 5 CRC:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Therefore, it is preferentially the right of the parents to determine what are the best interests of their child. However, they only are custodians of their child and are not legitimated to pursue own interests. The public authorities have to come into action if the best interests of the child are at risk or violated. Preventively they have to support parents or legal guardians in fulfilling their duties.

6.7.4 As art. 5 CRC says, the parental rights are to be fulfilled “consistent with the evolving capacities of the child”. Therefore, the best interests of the child are linked to the right of participation. In a general way it is stipulated in art. 12 CRC; but finally it is founded in the legal status of the child as a self-contained human subject, that his or her best interests cannot be defined without his or her participation. Therefore, general checklists are insufficient because they neglect the concrete situation of the individual child which can be expressed only by the child himself.

6.7.5 As the result of the consideration referred to art. 3 CRC the interests of the child do not prevail in any case; but without an explicit justification for what reason the interests of the child in the concrete situation have to stand back, the decision is incorrect and can – only based on this procedural fault – be attacked in administrative procedures by the right of objection or judicially as a legal action to the law court.

6.7.6 By the legal compulsion to disclose the process of consideration concerning the best interests of the child a serious social and political discussion is initiated even if the rights of the child at least have to stand back. That is a decisive precondition for advancements in children rights.
Dr. Reinald Eichholz, former Commissioner for children’s rights in North Rhine-Westphalia, Germany

June 2018